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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-162

THE BOARD OF REGENTS OF STATE COLLEGES, and ROGER E. GUILES,

Petitioners,

vs.

DAVID F. ROTH, for himself and for all others similarly situated,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief for the Wisconsin Education Association as Amicus Curiae

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Interest of the *Amicus Curiae*

David Roth, a "non-tenured" professor of political science employed by a government controlled and operated university, has challenged the summary termination of his employment. It is his position, and that of the Wisconsin Education Association (WEA), that when his employment was terminated by government action without his being given notice of the reasons for such action, and without his being accorded opportunity

to contest it, David Roth's constitutionally secured rights to substantive and procedural due process of law were denied.

The WEA has been in existence since 1853; it was incorporated by special act of the Wisconsin Legislature in 1855. Among the WEA's current 44,000 members are found professors and teachers employed in every kind of educational institution operated by government in Wisconsin. These educators are subject to a variety of customary practices and statutory provisions under Wisconsin law which provide or deny protection for their interests and rights when they would face loss of their employments.

WEA members who are professors employed by the State universities at Green Bay, Kenosha-Racine, Madison and Milwaukee may acquire, as a matter of custom and practice, a certain tenure status following employment for a period normally of three years. Those employed by other State universities may acquire a statutorily provided tenure status following a five-year probationary employment period. Sec. 37.31, Wis. Stat. (Prior to its amendment by ch. 233, Wis. Laws (1969), this same statute section provided for a probationary period of only three years.) WEA members who are employed by the State as teachers at its institutions for the retarded and handicapped are entitled to the protections of the State civil service system, see sec. 16.24, Wis. Stat., following a six-month probationary employment period. Sec. 16.22, Wis. Stat.

The majority of WEA members are employed as teachers by the public elementary, secondary and vocational school districts which are provided for by Wisconsin law and blanket the State. The great majority of these educators never acquire any tenure status, for under Wisconsin law a statutory tenure status is available only to public school teachers employed in Milwaukee

County, following a probationary period of three years. Sec. 118.23, Wis. Stat. All that the State statutes provide for a public school teacher not employed in Milwaukee County, when his employment would be terminated, is a "conference" with his employer. Sec. 118.22, Wis. Stat.

At stake in this case is the interest of a free society in seeing that the educators of its children are accorded the same respect at the hands of government and the same rights to substantive and procedural due process of law that constitutionally are secured to every citizen under our system. The WEA appears as an *amicus curiae* before this Court to oppose government employers who, unmindful of the elementary prerequisites of a free society, would act summarily to recklessly and arbitrarily injure professors and teachers by termination of their employments.

Issue Presented for Review

The issue presented for review in this case is whether, under our system, government will be permitted to act against a class of citizens to injure them, recklessly and arbitrarily, in a summary manner.

Argument

IT IS CONTRARY TO THE BASIC CONSTITUTIONAL REQUIREMENT THAT GOVERNMENT PROTECT AND PRESERVE OUR CHERISHED FREEDOMS TO PERMIT GOVERNMENT TO INJURE THE INDIVIDUAL BY ARBITRARILY AND SUMMARILY TERMINATING HIS EMPLOYMENT.

A. *Introduction.*

In this day and age when government terminates a man's employment against his will it severely injures him. When such

termination of employment by government is done arbitrarily, all society as well as the individual concerned is injured.

It is a truism that our cherished freedoms under this system of government survive only to the extent that the dignity, worth and value of the individual is protected. American democracy was conceived in the belief that ordered liberty survives only as this dignity and value is maintained. Throughout our history Americans have been called upon to protect and preserve this fundamental precept in a variety of ways and under various conditions of stress and sacrifice; some have given their lives in war; some have suffered immense personal hardships and deprivations in the fight against suppression of our liberties by unjust laws; but all has been justified because preservation of the dignity of every human being counted for something.

At stake in this case is not the continued employment of Roth; not the recognition of a "tenure" system; not the ability of a university to select qualified people; and not the convenience of government administrators. At stake in this case is the interest of a democratic people in the preservation of the concept that government must treat its people fairly; the concept that when government takes action against an individual employed by it, the employee must not be dealt with in an arbitrary and capricious manner.

B. *Government's responsibility to protect the freedom and dignity of individuals requires that before it acts to the detriment of a person employed by it there be an appropriate reason and a basis in fact to support it.*

The courts below concluded that the State could not terminate David Roth's employment without an appropriate reason and a basis in fact to support the reason. Consistent with the importance

of individual freedom and dignity, how could the standard be anything less? Any lesser standard permits government to act arbitrarily. To permit government to act arbitrarily is to permit suppression of freedom. Arbitrary action by government degrades and humiliates the individual. Men subject to such government must respond as sheep or as revolutionaries. Allowance of a substantive rule requiring less of government than that recognized by the courts below would be inconsistent with the purpose of government under our system. There is no more reason to permit arbitrary action in government employment relations than there is in any other area of government activity.

C. *The arguments of government employers that they should be able to terminate an employee for no reason or one that has no basis in fact are without merit and inconsistent with the basic purpose of government.*

1. *The tenure argument.*

Government employers argue that recognition of the requirement of due process of law in the employment termination context is in effect a granting of tenure. This argument confuses the issue.

That the standard adopted by the lower courts may afford non-tenured teachers some fraction of state conferred tenure rights cannot outweigh the importance of requiring government to act not arbitrarily. Notwithstanding a legitimate governmental interest in securing high quality employees, it is more important to require government to act consistent with the basic purpose of preserving individual freedom and dignity than to allow government unfettered discretion in dealing with certain employees, in the name of preserving unduplicated practices that bear the label "tenure".

Moreover, under our system the existence of constitutionally secured rights does not depend on the rights to which an individual may or may not be entitled by reason of a state statute or custom. Were it otherwise, what would be the value of having a constitutionally based system of law? If the rights to due process were secured only to those educators who enjoyed some tenure status under state law, then the protection afforded by such rights could be deferred for any length of time, or denied altogether, depending on the will or whim of administrators or a legislature.

2. *The "burden upon administrators" argument.*

It is argued that the administrative determination to retain or release an employee is such a delicate one that administrators and educators will find it impossible to articulate reasons for the decision, and such a burden should not therefore be imposed. Again this argument is based on an erroneous premise.

In the private employment sector millions of employees enjoy the security of "just cause" provisions in their employment contracts. For decades private employers have been articulating their reasons for equally delicate decisions, and defending them in grievance and arbitration proceedings. We should be entitled to expect as much from public employers.

More importantly, this argument tends to give governmental expedience priority over the interests of the individual. Again it ignores our most cherished concepts in favor of maintaining an easy responsibility, or irresponsibility, for government decision-makers.

Finally, unless the action is totally arbitrary it is difficult to conceive of a case where, when there exists a lawful reason for the termination of an educator's employment, there would not

exist some factual basis which led an administrator to conclude the man's employment should be terminated. It is hard to believe that government administrators are as inarticulate, incapable and timorous, in those areas where they daily must make judgments, as the government arguments would paint them to be.

D. *Government's responsibility to protect and preserve the dignity and freedom of individuals requires that before government acts to the detriment of a person employed by it, he is entitled to fair notice and a fair hearing if he desires it.*

To insure that government does not act arbitrarily, it is indispensable that there be a procedure to test government's action. Procedural due process seeks to assure that government will not act at odds with its basic purpose. The procedural requirements defined by the lower courts are designed to avoid arbitrary action. Within the overall range of procedural safeguards those adopted are minimal. In a country such as ours we certainly should accept nothing less.

E. *The arguments of government employers that they should be able to terminate the employment of non-tenured professors without giving notice of the reasons or opportunity for hearing are without merit and inconsistent with the basic purpose of government.*

1. *The inconvenience argument.*

It is contended that notice giving and hearing participation are burdensome and inconvenient, especially for governmental agents who work only part-time in that capacity or who are inexperienced in such matters. To the extent there may be truth in this proposition, it is again no reason to subvert the procedural rights of the individual employed by government. Throughout

the course of our national history procedural due process has been the guarantor of substantive rights. Where the issue is a defective bathtub, or which auto had crossed over the center-line before the collision, our citizens are afforded highly complex procedures for adjudication of their rights. The burden of such procedures on government has not caused them to be abandoned.

Here the implication is that government is somehow in a position where it is inconvenient for it to serve its most basic purpose. While loss of employment, with all its incidental damage to the individual, should warrant much greater procedural protection, government employers argue that even a minimum is too much.

In these times it is essential that our courts keep our populace from losing sight of the governmental attitudes and values which have historically set us apart from other systems of government. Such values and attitudes do not permit sacrifice of procedural due process of law for governmental convenience.

2. The "illusory" argument.

In support of reversal of the lower courts it has been contended that the due process standards set forth are "illusory" and meaningless. It is argued that, where a government employee insists on these rights, the government employer can easily find, or even fabricate, a reason for which there is some basis in fact, give notice of the same and an opportunity to be heard. In all probability, the employee would still lose his job.

In making that contention the government employers fail to understand that the real issue is not whether or not an individual retains or loses his job. The issue is whether or not government will be required in this context to afford the individual the basic fairness that is so essential to individual dignity and freedom.

Such fairness does not require that every employee keep his job; it only requires that government not act arbitrarily. To say that government will attempt to evade this responsibility evidences a degree of cynicism which we do not share. Moreover, the guarantee of a fair hearing would tend to minimize such attempts. In the long run, the requirements of fairness should breed respect for our system and tend to foster individual freedom.

Again, what is at stake is not whether a man retains or loses his job. It is our most precious heritage that is at stake. We cannot permit government to treat persons arbitrarily. If we permit this to occur we have a system which authorizes the government administrator to act at will to deny the exercise of freedom to those affected. The standards set by the court below are anything but "illusory". Without such rules we not only jeopardize our freedom, we breed a disrespect for our system by permitting it to operate arbitrarily and contrary to the way our citizens believe it should operate.

F. *Conclusion.*

Where government is permitted to act arbitrarily in its relationship with an individual it is acting contrary to the basic purpose for which it was created. The WEA asks that this Court affirm the decisions of the courts below and require that government accord David Roth both substantive and procedural due process of law.

Respectfully submitted,

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